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JASON COBURIAN ORTIOLA

FILED
DISTRICT COURT OF GUAM

FEB 15 2007 *nba*

MARY L.M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,)	CR-05-00047
)	
Plaintiff,)	REPLY BRIEF IN SUPPORT OF MOTION
)	TO VACATE, SET ASIDE, OR CORRECT
vs.)	SENTENCE
)	
JASON COBURIAN ORTIOLA,)	
)	
Defendant.)	
)	

Defendant, JASON COBURIAN ORTIOLA, by and through undersigned counsel, Richard P. Arens, Assistant Federal Public Defender, hereby submits his Reply Brief in Support of Motion to Vacate, Set Aside or Correct Sentence.

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ORIGINAL

BACKGROUND

On June 8, 2005, a grand jury indictment was handed down charging Jason Coburian Ortiola with one count of Distribution of Methamphetamine (count one), and one count of Carrying a Firearm During a Drug Trafficking Offense (count two). On August 24, 2005, Ortiola entered a plea of guilty to both counts.

Ortiola's Presentence Investigation Report (PSR) claimed that pursuant to USSG Section 2D1.1, the Base Offense Level for count one was 14. The PSR also indicated that pursuant to USSG Section 3B1.3, a 2 level increase should be added based on Abuse of Public Trust. With a 3 point decrease for Acceptance of Responsibility, Ortiola's Total Offense Level was 13, Criminal History Category I. The PSR claimed Ortiola's range of imprisonment was 12-18 months.

Ortiola filed his objection to the PSR, asserting he should not be given a 2 level increase for Abuse of Public Trust. The court denied Ortiola's objection and found that his total offense level was 13. On September 22, 2006, Ortiola was sentenced to 12 months on count one and 60 months on count two. Count two was to be served consecutively to count one.

On December 8, 2006, Ortiola filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C Section 2255. Ortiola alleged that counsel of record did not file a Notice of Appeal and merely informed him to "serve the time." (Motion to Vacate pg. 5).

**DEFENSE COUNSEL HAD ABSOLUTE DUTY TO
ASCERTAIN WHETHER DEFENDANT SOUGHT TO
APPEAL HIS SENTENCE AND AN ABSOLUTE DUTY TO
FILE A NOTICE OF APPEAL AT DEFENDANT'S REQUEST**

Two issues are now presented for review: Whether counsel asked defendant if he

desired to appeal his sentence and, if he did not, whether his failure to inquire rendered his assistance ineffective. The government contends Ortiola waived his right to collaterally attack his conviction, and that counsel's advice not to appeal his sentence was within the "wide range of reasonable professional assistance"

Ortiola first replies that he is not seeking to appeal his conviction. Rather, he is seeking to appeal his sentence. Ortiola next asserts that counsel had an affirmative duty to ascertain whether he wished to file a Notice of Appeal and an absolute duty to represent him on appeal until relieved as counsel of record.

Ninth Circuit Rule 4-1(a) of the Federal Rules of Appellate Procedure addresses each issue. The Rule specifically states retained counsel has a duty to ascertain whether defendant wishes to file a Notice of Appeal and continue to represent defendant until he is relieved by the court. In this case, Ortiola asserts counsel did neither and was thus ineffective in his failure to so assist.

CONCLUSION

For all of the above reasons, Ortiola requests the court vacate his sentence, resentence him and issue an order directing counsel to file a Notice of Appeal and continue representation until properly relieved by the court.

DATED: Mongmong, Guam, February 15, 2007.


RICHARD P. ARENS
Attorney for Defendant
JASON COBURIAN ORTIOLA

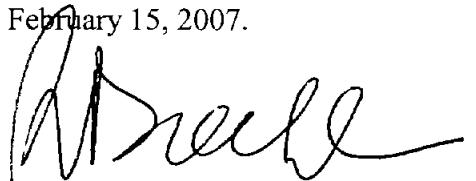
CERTIFICATE OF SERVICE

I, RENATE A. DOEHL, hereby certify that a true and exact copy of the foregoing document was filed with U.S. District Court and electronically served by the U.S. District Court Clerk's Office to the following on February 15, 2007:

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UNITED STATES OF AMERICA

DATED: Mongmong, Guam, February 15, 2007.



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